Privy Council Appeal No. 91 *of* 1947

Ghulam Hussain - - - - - - - - - - *Appellant*

v.

The King - - - - - - - - - - - *Respondent*

FROM

THE CHIEF COURT OF SIND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1949

Present at the Hearing:

LORD GREENE
LORD OAKSEY
LORD RADCLIFFE
SIR MADHAVAN NAIR
SIR LIONEL LEACH

[*Delivered by* SIR LIONEL LEACH]

This is an appeal, by special leave, from an order of the Chief Court of Sind, made in the exercise of its appellate criminal jurisdiction, summarily dismissing an appeal by the appellant from his conviction on charges of kidnapping a girl named Jasoda, aged eleven years, with intent to force her to illicit intercourse, and of raping her. The appellant was tried at the Chief Court Sessions jointly with his servant, Fatehsing, who was accused of having taken part in the kidnapping and of abetment of the rape. By a majority of 7 to 2 the jury found both the accused guilty of the offences charged against them. The learned Judge (Constantine, J.) accepted the verdict and sentenced the appellant to two years rigorous imprisonment under section 366 of the Indian Penal Code on the charge of kidnapping and to eight years rigorous imprisonment under section 376 on the charge of rape, the sentences to run concurrently. He sentenced Fatehsing to two years rigorous imprisonment under section 366 on the charge of kidnapping and to four years rigorous imprisonment under section 109 read with section 376 on the charge of abetment of the rape, these sentences likewise to run concurrently. An appeal by Fatehsing to the appellate side of the Chief Court was also summarily dismissed, but he did not apply for leave to appeal to His Majesty in Council.

The hearing of the arguments advanced on behalf of the appellant was concluded on the 30th November, 1949, when their Lordships announced that they would humbly advise His Majesty that the appeal should be dismissed and that they would state their reasons later. They now proceed to do so.

It was contended that the trial was vitiated by (1) the admission and use in evidence of a statement made by Fatehsing and recorded under section 164 of the Code of Criminal Procedure, (2) by the admission and

use in evidence of statements made to the police, contrary to section 162 of the Code of Criminal Procedure and (3) by unwarranted comments in the learned Judge's summing up to the jury on the evidence of a Dr. Ansari, a member of the staff of the Civil Hospital, Karachi. Their Lordships will deal with each of these allegations in turn and will then indicate what they regard as the decisive factors in the case, but before doing so it is necessary to outline the facts.

In 1945 Jasoda lived with her mother and other female relations in a house in Bombay Bazaar, Karachi. About five or six years previously she had lived with her mother in Moosa Lane, Karachi. The appellant lived in Moosa Lane, and the prosecution case was that he raped Jasoda in his house in that lane on the 6th September, 1945. Jasoda's account of what happened on the 6th September, 1945, is this: It was school holiday and she went to see her father, Kotumal by name, who had separated from his family and lived in another part of the town. As she found that her father was not at home she went to a temple, where she was given a free meal. After leaving the temple she met a band which was playing in the street and she followed it for some time. Eventually she arrived at the gate of the appellant's house in Moosa Lane. There she saw Fatehsing and the appellant. Fatehsing was standing by the gate to the compound, and the appellant was standing on the step to the house. She was thirsty and she asked Fatehsing for a drink of water. Fatehsing told her to come inside and he would give her water, whereupon she saw the appellant give his servant " a sign with his eye." They dragged her into the house and carried her into a room on the first floor where there was a bed. She was then raped by the appellant. As the result, she bled profusely. The two men then carried her downstairs and placed her upon the footpath just outside the house. She lay there unconscious for about fifteen minutes, after which she got up and slowly made her way home.

It is beyond dispute that she had been raped and that she was bleeding profusely when she arrived at her mother's house. She did not then tell her mother what had happened, but it was obvious that her condition was such that she required immediate medical attention. An ambulance was sent for and she was removed to the Civil Hospital, Karachi. She was first seen by Dr. Sobhraj, the First Assistant Surgeon at the hospital, who after a superficial examination told her mother that her daughter had been raped. Jasoda was then examined by Dr. Ansari, the medical officer on duty at the time. In his evidence Dr. Ansari stated that Jasoda had told him that she had been taken in a carriage to Singhoo Lane (which is some considerable distance from Moosa Lane) and there raped. This statement is entirely contrary to the evidence given by Jasoda, who denied ever having made such a statement.

The same evening Jasoda made a statement to the police. At about noon the next day she was taken by a police officer in a gharry to Moosa Lane. On the way the police officers asked two local hotel keepers to accompany them as *Mashirs,* which they did. Jasoda directed the driver of the gharry where to go. When they arrived at the appellant's house in Moosa Lane Jasoda told the driver to stop the gharry. Fatehsing was found standing at the gate in front of the house and Jasoda pointed him out to the police officer. Shortly afterwards the appellant appeared and she pointed him out as the person who had raped her. She then took the police officers and the two *Mashirs* to the room where she alleged the rape had taken place. The room was upstairs and it was used as a storeroom. The door was locked, but Fatehsing had the key and he unlocked it. There was a bed in the room and on it was a mattress. On the mattress were found blood and semen stains. Jasoda stated in her evidence that when she was taken into the room by the appellant and his servant on the day of the rape she noticed that there was in it a toy horse. In his statement at the trial the appellant said that his children's toys were generally kept in this room.

The appellant and Fatehsing were arrested on the 7th September, 1945, and the appellant was medically examined. It was found that there were injuries on his person which were consistent with the committal by him of the outrage on Jasoda.

A witness named Ladho stated that he had seen Jasoda coming out of a building in Moosa Lane about 3 or 3.30 p.m. on the 6th September, 1945. She looked perplexed and apparently had been weeping. When he heard that a girl had been raped he informed the police of what he had seen. His evidence may not agree with Jasoda's statement that she was carried out of the house by the accused and placed on the footpath. She was not, however, in a fit state to remember what really happened to her after the rape as she had received very severe injury. In fact she was an inpatient at the hospital for over three weeks and when she gave evidence on the 26th November, 1945, she was still under treatment. Their Lordships do not attach any importance to the fact that her evidence does not agree in detail with that of Ladho. What is important is that Ladho saw her coming out of the appellant's house that afternoon in a state of distress.

When awaiting trial Fatehsing intimated that he wished to make a confession. Consequently he was taken before a magistrate and after the formalities required by section 164 of the Code of Criminal Procedure had been carried out he made a statement, but it was not a confession. Although incriminating, it was intended to be exculpatory of himself. Its importance was that it constituted an admission by Fatehsing that on the day of the rape Jasoda came to the house and while she was upstairs with the appellant he acted as watchman at the gate. The statement could not be used in evidence against the appellant, but if admissible it could be used against Fatehsing. It was admitted as against him, but on no less than three occasions in the course of his summing up the learned Judge warned the jury that the statement was not to be taken as being evidence against the appellant. Even if the statement were inadmissible against Fatehsing it would not in the circumstances be reasonable to accept the argument that the reading of the statement to the jury had deprived the appellant of a fair trial. But no more need be said on this point because their Lordships consider that the statement was rightly admitted as against Fatehsing and being rightly admitted it was the duty of the learned Judge to read it to the jury in connection with the charges against Fatehsing.

It was suggested that the judgments of the Board in *Brij Bhushan Singh* v. *King-Emperor*, L.R., 73 I.A. 1, and *Bhuboni Sahu* v. *The King*, L.R. 76 I.A. 147, stand in the way of the admission of the statement in evidence, but this is not so. In those cases the Board was considering whether a statement made by a witness under section 164 of the Code of Criminal Procedure could be used against the accused as substantive evidence of the facts stated and it was held that such a statement could not be used in this way. The question here is quite different. It is whether a statement made under section 164, which does not amount to a confession, can be used against the maker as an admission within the purview of sections 18 to 21 of the Indian Evidence Acts. This question has been raised in Courts in India and it has been answered in the affirmative—see *Golam Mohammad Khan* v. *The King Emperor*, I.L.R. 4 Patna 327; *Agdul Rahim and ors.* v. *The King Emperor*, A.I.R. (1925) Cal. 926 and *Muhamad Bakhsh* v. *The King Emperor*, A.I.R. (1941) Sind. 129. Their Lordships consider that the affirmative answer is right. The fact that an admission is made to a Magistrate while he is functioning under section 164 of the Code of Criminal Procedure cannot take it outside the scope of the Evidence Act. Fatehsing's statement under section 164 of the Code of Criminal Procedure contained admissions provable under the Evidence Act and therefore the learned Judge was right in reading it to the jury as evidence in support of the charge against Fatehsing himself, having made it quite clear that the jury were not to take it into consideration against the appellant.

Subject to the provisions of sections 27 and 32 (1) of the Indian Evidence Act, section 162 of the Code of Criminal Procedure prohibits the use of

a statement made to a police officer in the course of an investigation under Chapter XIV of that Code at any inquiry or trial in respect of the offence which was under investigation. The argument advanced here was that statements made by Jasoda to the police officer who accompanied her to the house of the appellant on the day after the crime fell within the prohibition. Consequently it was said that it was not open to Jasoda to state in evidence that she had pointed out to the investigating officer the appellant as the person who had raped her or his house as the place in which the offence had been committed. Likewise it was not open to the police officer to say that Jasoda had pointed out to him the appellant as the person who had outraged her or his house as the scene of the crime. Section 162 is widely drawn, but how far the legislature intended it to have operation may be open to argument. For instance, there is a conflict of judicial opinion in India on the question whether the section excludes evidence of identification which has taken place at an identification parade held in the presence of a police officer. In a suitable case it may be necessary to decide the exact scope of section 162, but a decision of this nature is not called for here, because if all the statements now questioned by reason of section 162 are excluded there is still ample evidence to which no objection can be taken.

The complaint that the evidence of Dr. Ansari was unfairly criticized in the summing up to the jury must also be rejected. It is not necessary for their Lordships to enter upon a detailed discussion of the arguments advanced in support of the complaint. It is sufficient for them to say that they have been taken through the whole of the evidence and the summing up and they can find no justification for the suggestion that the summing up was in this respect unfair. In fact they consider that it was fair throughout.

Their Lordships are here Judges of fact as well as of law and it is their duty, as was indicated in *Mohur Sing* v. *Ghuriba,* 6 Bengal Law Reports 498, to consider whether, after throwing aside evidence to which reasonable objection can be taken, there remains sufficient to support the conviction of the appellant. This principle now finds statutory expression in section 167 of the Indian Evidence Act. Their Lordships have already indicated that in their opinion there is ample evidence left, after setting aside statements objected to by reason of section 162 of the Code of Criminal Procedure, to support the verdict of the jury, and it only remains for them to add that there is more than sufficient corroboration of Jasoda's account of the outrage committed upon her by the appellant in the testimony of Ladho, the fact that children's toys were kept in the room pointed out by Jasoda, the stains on the mattress and the injuries which the appellant himself bore.

For these reasons their Lordships have humbly advised His Majesty that this appeal should be dismissed.

(67518) Wt. 8062—42 180 2/50 D.L.

In the Privy Council

GHULAM HUSSAIN

v.

THE KING

DELIVERED BY SIR LIONEL LEACH

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